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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Darcy Lynn Wyatt,

10 Plaintiff,

11 v.

12 Andrew Saul,

13 Defendant.

No. CV-18-0416-TUC-LCK

ORDER

14
15 Plaintiff Darcy Wyatt filed this action pursuant to 42 U.S.C. § 405(g) seeking
16 judicial review of a final decision by the Commissioner of Social Security (Commissioner).
17 (Doc. 1.) Before the Court are Wyatt's Opening Brief, Defendant's Responsive Brief, and
18 Wyatt's Reply. (Docs. 16-18.) The parties have consented to Magistrate Judge jurisdiction.
19 (Doc. 13.) Based on the pleadings and the administrative record, the Court remands for
20 further proceedings.

21 **PROCEDURAL HISTORY**

22 Wyatt filed an application for Disability Insurance Benefits (DIB) in May 2015.
23 (Administrative Record (AR) 298.) She alleged disability from November 1, 2008. (*Id.*)
24 Wyatt's application was denied upon initial review (AR 196-205) and on reconsideration
25 (AR 206-21). A hearing was held on May 16, 2017. (AR 167-95.) Subsequently, the ALJ
26 found that Wyatt was not disabled. (AR 25-32.) The Appeals Council denied Wyatt's
27 request for review. (AR 1.)
28

1 **FACTUAL HISTORY**

2 Wyatt was born in 1958 and was 59 years of age at the time of the ALJ's decision.
3 (AR 298.) The ALJ found that Wyatt had severe impairments of COPD, Crohn's disease,
4 right degenerative meniscus tear without mechanical symptoms, and status post double
5 mastectomy. (AR 27.) The ALJ determined Wyatt had the Residual Functional Capacity
6 (RFC) to perform the full range of light work. (AR 29.) The ALJ concluded at Step Four,
7 based on the testimony of a vocational expert, that Wyatt could perform her past relevant
8 work as a gas station cashier, gas station manager, and retail cashier. (AR 31.)

9 **STANDARD OF REVIEW**

10 The Commissioner employs a five-step sequential process to evaluate DIB claims.
11 20 C.F.R. § 404.1520; *see also Heckler v. Campbell*, 461 U.S. 458, 460-462 (1983). To
12 establish disability the claimant bears the burden of showing she (1) is not working; (2) has
13 a severe physical or mental impairment; (3) the impairment meets or equals the
14 requirements of a listed impairment; and (4) claimant's RFC precludes her from
15 performing her past work. 20 C.F.R. § 404.1520(a)(4). At Step Five, the burden shifts to
16 the Commissioner to show that the claimant has the RFC to perform other work that exists
17 in substantial numbers in the national economy. *Hoopai v. Astrue*, 499 F.3d 1071, 1074
18 (9th Cir. 2007). If the Commissioner conclusively finds the claimant "disabled" or "not
19 disabled" at any point in the five-step process, he does not proceed to the next step. 20
20 C.F.R. § 404.1520(a)(4).

21 "The ALJ is responsible for determining credibility, resolving conflicts in medical
22 testimony, and for resolving ambiguities." *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
23 Cir. 1995) (citing *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989)). The findings
24 of the Commissioner are meant to be conclusive if supported by substantial evidence. 42
25 U.S.C. § 405(g). Substantial evidence is "more than a mere scintilla but less than a
26 preponderance." *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999) (quoting *Matney v.*
27 *Sullivan*, 981 F.2d 1016, 1018 (9th Cir. 1992)). The court may overturn the decision to
28 deny benefits only "when the ALJ's findings are based on legal error or are not supported

1 by substantial evidence in the record as a whole.” *Aukland v. Massanari*, 257 F.3d 1033,
2 1035 (9th Cir. 2001). This is so because the ALJ “and not the reviewing court must resolve
3 conflicts in the evidence, and if the evidence can support either outcome, the court may not
4 substitute its judgment for that of the ALJ.” *Matney*, 981 F.2d at 1019 (quoting *Richardson*
5 *v. Perales*, 402 U.S. 389, 400 (1971)); *Batson v. Comm’r of Soc. Sec. Admin.*, 359 F.3d
6 1190, 1198 (9th Cir. 2004). The Commissioner’s decision, however, “cannot be affirmed
7 simply by isolating a specific quantum of supporting evidence.” *Sousa v. Callahan*, 143
8 F.3d 1240, 1243 (9th Cir. 1998) (citing *Hammock v. Bowen*, 879 F.2d 498, 501 (9th Cir.
9 1989)). Reviewing courts must consider the evidence that supports as well as detracts from
10 the Commissioner’s conclusion. *Day v. Weinberger*, 522 F.2d 1154, 1156 (9th Cir. 1975).

11 **DISCUSSION**

12 Wyatt argues the ALJ committed two errors: (1) he failed to provide clear and
13 convincing reasons for rejecting her symptom testimony; and (2) he failed to account for
14 limitations arising from her Crohn’s disease in the RFC.

15 **Wyatt’s Symptom Testimony**

16 Wyatt argues the ALJ failed to provide clear and convincing reasons to reject her
17 symptom testimony. In general, “questions of credibility and resolution of conflicts in the
18 testimony are functions solely” for the ALJ. *Parra v. Astrue*, 481 F.3d 742, 750 (9th Cir.
19 2007) (quoting *Sample v. Schweiker*, 694 F.2d 639, 642 (9th Cir. 1982)). However,
20 “[w]hile an ALJ may certainly find testimony not credible and disregard it . . . [the court]
21 cannot affirm such a determination unless it is supported by specific findings and
22 reasoning.” *Robbins v. Soc. Sec. Admin.*, 466 F.3d 880, 884-85 (9th Cir. 2006); *Bunnell v.*
23 *Sullivan*, 947 F.2d 341, 345-346 (9th Cir. 1995) (requiring specificity to ensure a reviewing
24 court the ALJ did not arbitrarily reject a claimant’s subjective testimony); SSR 96-7p. “To
25 determine whether a claimant’s testimony regarding subjective pain or symptoms is
26 credible, an ALJ must engage in a two-step analysis.” *Lingenfelter v. Astrue*, 504 F.3d
27 1028, 1035-36 (9th Cir. 2007).

1 Initially, “the ALJ must determine whether the claimant has presented objective
2 medical evidence of an underlying impairment ‘which could reasonably be expected to
3 produce the pain or other symptoms alleged.’” *Id.* at 1036 (quoting *Bunnell*, 947 F.2d at
4 344). The ALJ found Wyatt had satisfied part one of the test by proving impairments that
5 could produce the symptoms alleged. (AR 30.) Next, “unless an ALJ makes a finding of
6 malingering based on affirmative evidence thereof, he or she may only find an applicant
7 not credible by making specific findings as to credibility and stating clear and convincing
8 reasons for each.” *Robbins*, 466 F.3d at 883; *Benton v. Barnhart*, 331 F.3d 1030, 1040 (9th
9 Cir. 2003) (holding an ALJ can reject claimant testimony if he finds evidence of
10 malingering). The ALJ did not make an affirmative finding of malingering. Therefore, to
11 support his discounting of Wyatt’s assertions regarding the severity of her symptoms, the
12 ALJ had to provide clear and convincing, specific reasons. *See Robbins*, 466 F.3d at 883.

13 In July 2015, Wyatt completed an Exertional Daily Activities Questionnaire in
14 which she stated that when she felt up to it she would do light chores for a maximum of
15 ten minutes, such as a load of laundry, loading the dishwasher, feeding the rabbits, or
16 watering plants, but most of the time she lay in bed watching television with a one to three
17 hour daily nap (AR 384, 385); her ability to walk and sit was very limited due to pain and
18 incontinence, but she would go to the store for up to twenty minutes with her husband (AR
19 384); she could drive to the doctor’s office but her husband usually drove her (AR 385).

20 At the hearing, in May 2017, Wyatt testified that her inability to work was due to
21 pain, incontinence, and infections stemming from her Crohn’s disease.¹ (AR 174.) The
22 infections caused flu-like symptoms every few months and were resistant to treatment. (AR
23 184.) She stated that she alternated between diarrhea incontinence and constipation and
24 bloating causing pain. (AR 174-75.) She needed to be close to the bathroom because she
25 had to go with little warning many times a day. (AR 183.) She testified that when she was
26 up to it she would water plants or help with dishes, but she rarely left the house except for

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28 ¹ In discussing Wyatt’s symptom testimony, the ALJ summarized the July 2015
Daily Activities Questionnaire but did not mention her 2017 hearing testimony. (AR 29.)

1 doctor's appointments. (AR 175.) Her husband did the cooking and most of the shopping,
2 and she spent much of her day in bed. (AR 176-77.) She tried to move around and did
3 physical therapy after her double mastectomy, but her movement was limited from
4 scarring. (AR 176, 183.) She tore her meniscus and it would swell up if she walked for
5 twenty minutes. (AR 180.) She could sit for an unlimited period if she didn't need to go to
6 the bathroom or was not in pain; however, most of the time, she had knee and/or stomach
7 pain. (AR 181.) For pain she took only Tylenol, which helped, but was reluctant to become
8 dependent on pain meds. (AR 182.) She felt her memory and comprehension had suffered
9 and she was dependent on her husband. (AR 184.)

10 First, the ALJ found that Wyatt's testimony about her limitations was not fully
11 consistent with the medical record. (AR 30.) In particular, the ALJ noted that examination
12 results "were generally mild." (*Id.*) The ALJ cited the following records: October 2010,
13 denied incontinence; January 2013, bilateral lower extremity edema; January 2015, double
14 mastectomy; April 2015, COPD and mild persistent asthma diagnoses; June 2015, ileocolic
15 resection and findings consistent with active inflammatory bowel disease; July 2015,
16 Crohn's disease stable on current medication; August 2015, diminished breath sounds,
17 normal gait, no edema; October 2015, no edema, mildly decreased appetite; January 2016,
18 active Crohn's disease, possible small bowel obstruction; February 2016, Crohn's disease
19 stable; February to April 2016, bilateral total mastectomy, improved to healed; April 2017,
20 complex nondisplaced tear of medial meniscus of right knee; April 2017, asthma mild,
21 normal gait and standing without difficulty, respiratory effect normal, mild right knee
22 swelling and pain but no mechanical symptoms. (AR 29-30.)

23 The Court assesses the complete Administrative Record, including medical records
24 with dates prior to the ALJ's decision but submitted for the first time to the Appeals
25 Council. (AR 2.)² The ALJ's summary of the medical evidence was cursory and only

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27 ² Regarding medical records dated February 10, 2005, through August 8, 2017, the
28 Appeals Council stated: "We find this evidence does not show a reasonable probability that
it would change the outcome of the decision. We did not consider and exhibit this
evidence." (AR 2.) When the Appeals Council considers new evidence in reaching its
determination, that evidence is part of the Administrative Record and this Court must

1 supported by substantial evidence as to some of Wyatt's impairments. For example, it was
2 legitimate to find that Wyatt typically exhibited mild symptoms from her asthma and
3 COPD and had only episodic mild edema. However, the ALJ did not fully and accurately
4 characterize the medical records documenting Wyatt's Crohn's disease, which she testified
5 was the primary source of the symptoms that precluded her from working. (AR 174.)

6 Wyatt was first diagnosed with Crohn's disease in 2005, after exhibiting symptoms
7 for many years. (AR 51, 71, 473-74.) In 2009 and 2010, Wyatt's symptoms were up and
8 down, but she consistently reported diarrhea and frequent bowel movements, up to 9 or 10
9 per day. (AR 73, 77, 81, 83, 85, 87, 88, 90, 92, 97, 98.) The record shows Wyatt continued
10 to have chronic or "baseline" diarrhea through 2017, even when her Crohn's disease was
11 noted to be stable or improved. (AR 100, 105, 160, 441, 469, 473, 489, 495, 497, 502, 505,
12 510, 703, 520, 685, 713, 854.) Throughout 2011 and into 2012, Wyatt reported flu-like
13 symptoms, including chronic fatigue, stemming from her Crohn's disease. (AR 105, 107,
14 618, 637, 646, 649.) She had subsequent reports and treatment for Crohn's flare-ups,
15 including flu-like symptoms. (AR 510, 690, 713.) She reported bowel incontinence in
16 March 2012 (AR 470), January 2015 (AR 523), and March 2017 (AR 857), and explosive
17 diarrhea in August 2017. (AR154.) Over the years, Wyatt consistently described abdominal
18 pain and exhibited tenderness upon exam. (AR 52, 64-65, 70, 73, 83, 86, 96, 98, 105, 442,
19 469, 471, 473, 510, 520, 854.) Since 2005, repeated diagnostic imaging documented active
20 Crohn's disease. (AR 68, 76, 478, 518, 557, 860.) Because Wyatt's Crohn's disease was

21 consider it. *Brewes v. Comm'r of Soc. Sec. Admin.*, 682 F.3d 1157, 1163 (9th Cir. 2012).
22 The Appeals Council assessed the merits of the newly-submitted medical records by
23 evaluating whether they would change the ALJ's finding that Wyatt was not disabled;
24 therefore, it necessarily "considered" the evidence despite its statement to the contrary. *See*
25 *Ramirez v. Shalala*, 8 F.3d 1449, 1452 (9th Cir. 1993) (denial of review is on the merits
26 when based on finding that newly-submitted material did not warrant a different outcome);
27 *Patrick K.G. v. Saul*, No. SA CV 18-01156-RAO, 2019 WL 2613456, at *9 (C.D. Cal. June
28 26, 2019) (finding determination that evidence would not change the outcome requires
Appeals Council to "consider" the evidence); *Reyes v. Comm'r of Soc. Sec. Admin.*, No.
CV-17-08192-PCT-SMB, 2019 WL 2098755, at *3 (D. Ariz. May 14, 2019) (finding
evidence submitted to Appeals Council was part of the record because the council "made
a finding about the merits of the additional evidence and considered whether it would
change the outcome of the decision."). Therefore, in reviewing the ALJ's decision, this
Court must consider the medical records submitted to the Appeals Council that pre-dated
the ALJ's decision (records dated after the ALJ's decision were not considered by the
Appeals Council (AR 2)).

1 not fully controllable with medication, she had bowel resection surgeries in 2010 and 2017.
2 (AR 83, 85, 87, 135, 453, 850.) Wyatt noted a weight loss of fourteen pounds prior to the
3 2010 surgery and weight loss again in 2017. (AR 88, 160, 763.) With respect to Crohn's
4 disease, the record as a whole supports Wyatt's symptom testimony of chronic pain and
5 diarrhea, accompanied by fatigue and abdominal tenderness. Further, there is longitudinal
6 objective medical evidence of active Crohn's disease leading to surgeries. The Court finds
7 there was not substantial evidence supporting the ALJ's finding that Wyatt's symptom
8 testimony was inconsistent with the record or the medical examinations.

9 Next, the ALJ relied on the absence of medical opinions consistent with Wyatt's
10 symptom testimony. (AR 30.) At the time of the ALJ's decision, the only medical opinions
11 were those of the State agency consultants. In 2015, both of those doctors concluded Wyatt
12 could do medium exertion level work but was limited in her exposure to pulmonary
13 irritants. (AR 204, 229.) The ALJ stated that he gave their opinions only partial weight,
14 concluding the overall record indicated Wyatt was limited to light exertion work but she
15 had no limitation to working around irritants. (AR 31.)

16 Wyatt submitted 2017 medical opinions to the Appeals Council from her primary
17 care physician, Dr. Lee, and her treating gastroenterologist, Dr. Dinning. In offering his
18 opinion, Dr. Dinning noted that he had been treating Wyatt for eight years and he discussed
19 her Crohn's disease over the course of those years. (AR 8.) Dr. Lee stated that Wyatt's
20 limitations set forth in her opinion had been present since 2010. (AR 15.) The Appeals
21 Council concluded these opinions were not related to the period prior to the ALJ's August
22 25, 2017 decision. (AR 2.) This was error. *See Taylor v. Comm'r of Soc. Sec. Admin.*, 659
23 F.3d 1228, 1232 (2011) (holding that an after-dated medical opinion is relevant to an earlier
24 period if the doctor treated the claimant during that time or, if it is related to a medical
25 condition already present during the earlier period). Because Drs. Lee and Dinning treated
26 Wyatt during the relevant period and offered opinions about medical conditions present
27 prior to August 2017, this Court may consider their opinion evidence in reviewing the
28 ALJ's decision. *See id.* at 1232-33.

1 Dr. Lee opined that, during an 8-hour work day, Wyatt could sit for one hour, stand
2 for 15 minutes, and walk for 10 minutes; during the remainder of the day, she would be
3 resting. (AR 11.) The doctor premised her opinion, in part, on Wyatt's history of Crohn's
4 disease including chronic diarrhea. (AR 15.) Dr. Dinning opined that Wyatt was "near
5 incapacitated" due to abdominal pain and diarrhea, could not sit for extended periods,
6 required frequent trips to the bathroom (up to several times an hour), and experienced
7 bowel incontinence. (AR 8.) These opinions were consistent with Wyatt's symptom
8 testimony. Thus, the ALJ's finding otherwise was not legitimate or supported by
9 substantial evidence.

10 The Court finds the ALJ failed to provide clear and convincing reasons supported
11 by substantial evidence to reject Wyatt's symptom testimony.

12 **Crohn's Disease**

13 Wyatt argues the ALJ's RFC finding failed to account for her severe diarrhea that
14 would cause her to be off-task unexpectedly numerous times a day. The ALJ did not discuss
15 Wyatt's diarrhea specifically but cited the following record evidence related to her
16 symptoms caused by Crohn's disease: October 2010, Wyatt denied incontinence (AR 39
17 (citing AR 652)); June 2015, surgery results consistent with active inflammatory bowel
18 disease (AR 39-40 (citing AR 724)); July 2015, Crohn's disease stable on current treatment
19 (AR 30 (citing AR 722)); January 2016, active Crohn's disease (*Id.* (citing AR 781));
20 February 2016, Crohn's disease stable (*Id.* (citing AR 727)).

21 Above, the Court considered the entirety of the record with respect to Wyatt's
22 symptom testimony, including her diarrhea and incontinence. The Court found the ALJ's
23 rejection of Wyatt's testimony regarding her Crohn's disease symptoms was not supported
24 by substantial evidence. Further, two of Wyatt's treating physicians opined that she was
25 unable to maintain employment due, in part, to the symptoms of Crohn's disease, including
26 severe diarrhea. (AR 8, 10-15.) Because the ALJ did not account for all of Wyatt's
27 limitations imposed by her Crohn's disease, specifically time she would be off-task due to
28 frequent diarrhea, he erred. *See Carmickle v. Comm'r, Soc. Sec. Admin.*, 533 F.3d 1155,

1 1164 (9th Cir. 2008) (citing SSR 96-8p requiring ALJs to consider all limitations imposed
2 by an impairment).

3 CONCLUSION

4 A federal court may affirm, modify, reverse, or remand a social security case. 42
5 U.S.C. § 405(g). When a court finds that an administrative decision is flawed, the remedy
6 should generally be remand for “additional investigation or explanation.” *INS v. Ventura*,
7 537 U.S. 12, 16 (2006) (quoting *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744
8 (1985)); *see also Moisa v. Barnhart*, 367 F.3d 882, 886 (9th Cir. 2004).

9 The ALJ erred in discounting Wyatt’s symptom testimony without providing clear
10 and convincing reasons and in failing to account for limitations imposed by a symptom of
11 Wyatt’s Crohn’s disease, diarrhea. Wyatt requests that the Court credit as true her symptom
12 testimony and remand for an award of benefits. Application of the credit as true rule is not
13 warranted if further proceedings would be useful or there are outstanding issues that must
14 be resolved. *See Leon v. Berryhill*, 800 F.3d 1041, 1047 (9th Cir. 2017). Here, there are
15 outstanding issues to be resolved on remand.

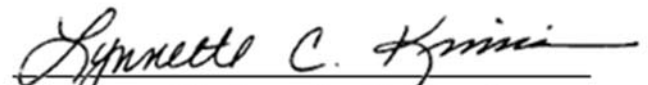
16 Wyatt’s symptom testimony does not correlate directly to a finding of disability
17 based on the current record evidence. Further, substantial new evidence, both medical
18 records and medical opinions, was submitted to the Appeals Council. The Council
19 erroneously did not consider the medical opinions of Wyatt’s treating physicians and
20 considered, but articulated an intent to exclude from consideration, the medical records.
21 *See supra* note 2. “Where the Appeals Council was required to consider additional
22 evidence, but failed to do so, remand to the ALJ is appropriate so that the ALJ can
23 reconsider [his] decision in light of the additional evidence.” *Taylor*, 659 F.3d at 1233,
24 1235. Finally, Wyatt alleged an onset date of 2008. There are no medical records from that
25 year and there is a gap in the record from September 2005 (AR 71) to July 2009 (AR 73).
26 Additionally, Dr. Lee’s opinion stated that it reached back only to 2010 (AR 15), and it
27 appears Dr. Dinning began treating Wyatt some time after 2009. Even if Wyatt is found to
28 be disabled, the ALJ must conduct further proceedings to determine the onset date. *See*

1 *Luna v. Astrue*, 623 F.3d 1032, 1035 (9th Cir. 2010) (remand is proper when onset date
2 remains an outstanding issue).

3 Accordingly,

4 **IT IS ORDERED** that this case is remanded to the ALJ for a new hearing and
5 further proceedings, pursuant to sentence four of 42 U.S.C. § 405(g). The Clerk of Court
6 should enter judgment and close this case.

7 Dated this 11th day of July, 2019.

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11 Honorable Lynnette C. Kimmins
12 United States Magistrate Judge
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